OFFICE OF THE ATTORNEY GENERAL

December 28, 2010

LEGAL MEMORANDUM

Ref: DPHSS 10-1018

TO: Acting Director, Department of Public Health and Social Services

FROM: Attorney General

SUBJECT: Contractor’s Minimum Wage Requirements – Exempt Employees

Recently you have contacted this Office inquiring about contracts entered into by the Division of Senior Citizens with non-profit organizations for providing aging programs. You have noted that 5 GCA §5801 provides in part:

In such cases where the government of Guam enters into contractual arrangements with a sole proprietorship, a partnership or a corporation (‘contractor’) for the provision of a service to the government of Guam, and in such cases where the contractor employs a person(s) whose purpose, in whole or in part, is the direct delivery of service contracted by the government of Guam, then the contractor shall pay such employee(s) in accordance with the Wage Determination for Guam and the Northern Mariana Islands issued and promulgated by the U.S. Department of Labor for such labor as is employed in the direct delivery of contract deliverables to the government of Guam.

Five GCA §5802 additionally requires that any contract which this Article applies to shall also contain provisions mandating health and similar benefits for employees covered by this Article.

You have questioned whether 5 GCA §§5801 and 5802 extend to program managers and other positions identified as exempt as defined in 22 GCA §3108(b), but who perform, in part, direct services to clients. Stated differently, would 22 GCA §3108(b) exempt program managers and others occupying exempt positions from receiving the minimum wage under the Wage Determination for Guam, as well as the health and welfare benefits required under 5 GCA §5802? The short answer to this question is yes, 5 GCA §§5801 and 5802 would not apply to positions that are deemed exempt-positions under 22 GCA §3108(b), provided the position is in fact exempt under the rules outlined below.

Discussion

22 GCA §3018 exempts certain employees from the provisions of 22 GCA §§3105 (minimum wage requirements) and 3107 (maximum hours, overtime; split shifts). In general, persons in these particular...
positions are exempt from the minimum wage requirements and are employees who are employed in the following bona fide capacities: (1) executive capacity §3108(b)(1); (2) administrative capacity §3108(b)(2); (3) professional capacity §3108(b)(3); (4) outside salesperson §3108(b)(4); and (5) teaching/instruction positions §3108(b)(5). There are other positions mentioned in §3108 that fall within the exempt positions as well, meaning they are also exempt from the minimum wage provisions, however they do not seem to be relevant for the work performed at DPHSS. In addition to the type of position being determined as exempt, there are also minimum salary requirements for such a position to be deemed exempt.

In general, the federal regulations and local law exempt certain types of positions from the minimum wage requirement and overtime requirements. As explained in 29 CFR §541.0(a):

Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of an outside sales employee, as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act. Section 13(a)(17) of the Act provides an exemption from the minimum wage and overtime requirements for computer systems analysts, computer programmers, software engineers, and other similarly skilled computer employees.

29 CFR § 541.0.

Furthermore, a job title is insufficient in determining whether a position is exempt or not. As stated in 29 CFR §541.2 “A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.”

1. Relationship of 5 GCA §5801 to 22 GCA §3101 et seq.

22 GCA §3101 et seq. known as the Minimum Wage and Hour Act establishes the minimum wage an employer must pay an employee and establishes the maximum number of hours an employee must work before an employer must pay overtime pay. 22 GCA §3105 establishes the minimum wage payment rate at $5.75 per hour. However 22 GCA §3121 provides for an automatic increase in the minimum wage rate whenever a Federal Law established a minimum wage higher than the rate established in §3105. Currently, the minimum wage rate for Guam is $7.25 per hour worked.

Certain positions are exempt from the minimum wage and hour requirement. These positions are found in 22 GCA §3108, and include, employees hired in the following capacities: executive; administrative; professional; outside sales; and teaching. Section 3108 provides for additional exemptions as well. Thus, these positions are not subject to the minimum wage requirements and overtime pay.

While 22 GCA §3101 et seq. applies to all employers in Guam, there are special provisions for wages to be paid to workers working on service contracts with the Government of Guam. See “Cross-references” in Title 22, Chapter 3, Article 1, Guam Code Annotated (“For wages required to be paid to workers working on contracts with the Government of Guam, see 5 GCA Chapter 5, Art. 13 [a part of the Guam Procurement Law]”). 5 GCA §§§5801 and 5802 outline the special provisions that apply to employees who work pursuant to a government contract and provide the direct delivery of services to the government of Guam. Guam’s provisions are similar to the federal McNamara-O’Hara Service Contract Act found at
41 USC §351 et seq., which outlines the minimum wage rate and hours for non-exempt employees who provide services to the U.S. Government pursuant to a service contract. The federal statute and regulations may be used to interpret the local statute to the extent the two statutes are consistent. See Sumitomo Const. Co., Ltd. v. Zhong Ye, Inc. 1997 Guam 8 (noting that it is appropriate to look to federal sources for interpreting a Guam statute when the local statute is based upon a federal statute).

5 GCA §5801 outlines the wages to be paid to employees who are working for a contractor who has a service contract with the Government of Guam. It provides:

§ 5801. Wage Determination Established.

In such cases where the government of Guam enters into contractual arrangements with a sole proprietorship, a partnership or a corporation (contractor) for the provision of a service to the government of Guam, and in such cases where the contractor employs a person(s) whose purpose, in whole or in part, is the direct delivery of service contracted by the government of Guam, then the contractor shall pay such employee(s) in accordance with the Wage Determination for Guam and the Northern Mariana Islands issued and promulgated by the U.S. Department of Labor for such labor as is employed in the direct delivery of contract deliverables to the government of Guam.

The Wage Determination most recently issued by the U.S. Department of Labor at the time a contract is awarded to a contractor by the government of Guam shall be used to determine wages, which shall be paid to employees pursuant to this Article. Should any contract contain a renewal clause, then at the time of renewal adjustments, there shall be made stipulations contained in that contract for applying the Wage Determination, as required by this Article, so that the Wage Determination promulgated by the U.S. Department of Labor on a date most recent to the renewal date shall apply.

Therefore, under 5 GCA §5801, if the Government of Guam enters into a service contract with a contractor, the non-exempt employees of the contractor must be paid a minimum wage established in accordance with the Wage Determination for Guam and the Northern Mariana Islands, issued and promulgated by the U.S. Department of Labor for such labor. Additionally, under 5 GCA §5802, the non-exempt service employees must also be provided with health and similar benefits established by the U.S. Department of Labor as well as a certain number of paid holidays per annum. The minimum wage rate for service contract employees may be higher than the minimum wage rate provided for other Guam employees under 22 GCA §3121.

The exemptions from the minimum wage and hour provisions found in 22 GCA §3108 will likewise apply to the minimum wage provisions and benefits provisions found in 5 GCA §§5801 and 5802. This is supported by a footnote in the U.S. Department of Labor Wage and Hour Division, Minimum Wage Laws in the States, July 1, 2010 (www.dol.gov/whd/minwage/america.html). This footnote states “[l]ike the Federal wage and hour law, State law often exempts particular occupations or industries from the minimum labor standard generally applied to covered employment.” As such, the positions listed in 22 GCA §3108 will be exempt from the requirements of 5 GCA §§5801 and 5802.

The federal counterpart to 5 GCA §5801 and §5802 supports this finding. While “service employee” as that term is used in the Federal law is not defined in the Guam statute, the federal statute does define it and specifically excludes the types of positions found in 22 GCA §3108. Under the McNamara-O’Hara Service Contract Act, the term “service employee” is defined as:

(b) The term “service employee” means any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish
services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of Title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

41 U.S.C.A. § 357(b)

Therefore, under the federal statute, the definition of a service employee, one who is covered by the minimum wage permitted under the McNamara-O’Hara Service Contract Act, specifically excludes executive, administrative and professional positions.

29 CFR §4.113(a) explains the term “contracts to furnish services ‘through use of service employees’”. While the wording of the Guam statute is slightly different than the McNamara-O’Hara Service Contract Act, because the Guam statute parallels the Federal statute, the federal regulations are helpful in interpreting how the Guam statute would apply. 29 CFR §4.113(a) provides in part:

(2) The coverage of the Act does not extend to contracts for services to be performed exclusively by persons who are not service employees, i.e., persons who are bona fide executive, administrative or professional personnel as defined in part 541 of this title (see paragraph (b) of this section). A contract for medical services furnished by professional personnel is an example of such a contract.

(3) In addition, the Department does not require application of the Act to any contract for services which is performed essentially by bona fide executive, administrative, or professional employees, with the use of service employees being only a minor factor in the performance of the contract. However, the Act would apply to a contract for services which may involve the use of service employees to a significant or substantial extent even though there is some use of bona fide executive, administrative, or professional employees in the performance of the contract. For example, contracts for drafting or data processing services are often performed by drafters, computer operators, or other service employees and are subject to the Act even though the work of such employees may be performed under the direction and supervision of bona fide professional employees.

(4) In close cases involving a decision as to whether a contract will involve a significant use of service employees, the Department of Labor should be consulted, since such situations require consideration of other factors such as the nature of the contract work, the type of work performed by service employees, how necessary the work is to contract performance, the amount of contract work performed by service employees vis-a-vis professional employees, and the total number of service employees employed on the contract.

Thus, the Federal regulation makes it clear that the Federal counterpart to Guam’s statute does not apply to persons who are bona fide executive, administrative or professional personnel. 29 CFR §4.113(a)(2). Furthermore, the Act does not apply to contracts performed essentially by bona fide executive, administrative, or professional employees, with the use of service employees being only a minor factor in the performance of the contract. Thus, if most of the work under the contract was performed mostly by executive, administrative or professional employees, and only a minor part of the contract consisted of work by service employees, the Federal act would not apply and the service employees would not be paid the minimum wage required under the McNamara-O’Hara Act. 29 CFR §4.113(a)(3).
On the other hand, 29 CFR §4.113(a)(3) makes it clear that the Federal Act would apply to a contract for services which may involve the use of service employees to a significant or substantial extent even though there is some use of bona fide executive, administrative, or professional employees in the performance of the contract. But the Federal Act’s wages would not apply to the executive, administrative or professional employees, as they are not “service employees”.

The regulations also note, for purposes of the Federal Act, the U.S. Department of Labor should be consulted in close cases involving a decision as to whether a contract will involve a significant use of service employees. 29 CFR §4.113(a)(3). In this particular case, in close cases where there is a question whether 5 GCA §§5801 and 5802 should apply to a “service contract”, the Guam Department of Labor should be consulted.

Thus, in general, a position that is exempt from the general Minimum Wage and Hour Act under 22 GCA §3108 would also be exempt from the Minimum Wage and Benefit provisions under 5 GCA §§5801 and 5802 if people in those positions are being paid under a contract for the provisions of services to the Government of Guam. However, as discussed above, whether non-exempt positions would be covered under 5 GCA §§5801 and 5802 depends on if the services contract was being performed mostly by “service employees”.

2. Types of Exempt Positions

The following are the four most basic positions that may be at issue here. There are other exempt positions outlined in 22 GCA §3018 that the Department should review. All positions use the term “primary duty” and some positions used the term “customarily and regularly” to describe the supervision level over others, or the amount an employee is away from the employer’s business performing his job. It is necessary to understand the meaning of these terms, in order to determine whether the position is considered exempt. They are discussed further below.

a. Executive Capacity

The term “employee employed in a bona fide executive capacity” shall mean any employee:

1. Compensated on a salary or fee basis at a rate of not less than $455 per week; and

2. Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

3. Who customarily and regularly directs the work of two or more other employees; and

4. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(emphasis added).

The term “two or more other employees” means 2 full-time employees. 29 CFR §541.104(a). Thus, one full-time and two half-time employees are equivalent to 2 full-time employees. Id.

b. Administrative Capacity

The term “employee employed in a bona fide administrative capacity” shall mean any employee:
(1) Compensated on a salary or fee basis at a rate of not less than $455 per week; and

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

The regulations clarify what is considered management or general business operations of the employer as follows:

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase “directly related to the management or general business operations” refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

29 CFR § 541.201 (emphasis added).

Additionally, one must exercise discretion and independent judgment. This is explained in 29 CFR §541.202 as:

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term “matters of significance” refers to the level of importance or consequence of the work performed.

29 CFR § 541.202(a).

c. Professional Capacity

The term “employee employed in a bona fide professional capacity” shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week; and

(2) Whose primary duty is the performance of work:
(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

It shall also include computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field.

d. Outside Sales Person

The term “employee employed in the capacity of outside salesman” shall mean any employee:

(1) Whose primary duty is:

(i) making sales, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

The salary requirements do not apply to an outside sales person.

3. Primary Duty

29 CFR §541 et seq. outlines the definitions and delimits the exemptions for executive, administrative, professional, computer and outside sales employees. One of the factors in determining whether a position is exempt is to look at the primary duty of that position. Specifically, 26 CFR §541.700(a) provides that:

To qualify for exemption under this part, an employee's “primary duty” must be the performance of exempt work. The term “primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of non-exempt work performed by the employee.

29 CFR § 541.700.

Thus, under all the facts and circumstances in a particular case, the employee’s “primary duty” must be the performance of exempt work, or the main, major or most important duty that the employee performs. In making such an evaluation, one must compare the relative importance of the exempt duties as compared with other types of duties, the amount of time spent performing exempt work, the employee’s freedom from direct supervision; and the relationship of the employee’s salary and wages paid to other employees for the kind of non-exempt work performed by the employee.
Additionally, the amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. 29 CFR §541.700(b). Generally, employees who spend more than 50 per cent of their time performing exempt work will generally satisfy the primary duty requirement. However, time alone is not the sole test. *Id.* Employees who do not spend more than 50 percent of their time performing exempt work may meet the primary duty requirement if the other factors support such a conclusion. *Id.* As such, simply because one performs non-exempt functions does not preclude an employee from being deemed to hold an exempt position.

The regulations provide the following example in determining whether an employee's primary duty is exempt:

Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

29 CFR § 541.700 (c).

4. Customarily and Regularly

The phrase “customarily and regularly” means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed “customarily and regularly” includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks. 29 CFR § 541.701.

5. Exempt Work

The term “exempt work” means generally, all the positions described in 22 GCA §3108 and activities directly and closely related to such work. All other work is considered non-exempt. See 29 CFR §541.702.

6. Directly and Closely Related

Work that is “directly and closely related” to the performance of exempt work is also considered exempt work. The phrase “directly and closely related” means tasks that are related to exempt duties and that contributes to or facilitate performance of exempt work. Thus, “directly and closely related” work may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's exempt work cannot be performed properly. Work “directly and closely related” to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not “directly and closely related” if the work is remotely related or completely unrelated to exempt duties.

29 CFR § 541.703

The regulations give the following examples as being directly and closely related to an exempt function:
(1) Keeping time, production or sales records for subordinates is work directly and closely related to an exempt executive's function of managing a department and supervising employees.

(2) The distribution of materials, merchandise or supplies to maintain control of the flow of and expenditures for such items is directly and closely related to the performance of exempt duties.

(3) A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

29 CFR § 541.703. This is only a partial list of examples.

7. Amount of Salary Required

29 CFR §541.600 outlines the amount of salary required for a particular position. Some specific professional positions do not require a minimum salary amount to be considered exempt. As stated in the regulations:

In the case of computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than $27.63 an hour, as provided in § 541.400(b).

In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (see § 541.303); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (see § 541.304); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (see § 541.304). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

29 CFR § 541.600(d) and (e).

CONCLUSION

You have inquired whether 5 GCA §§5801 and 5802 would extend to program managers and other positions identified as exempt under 22 GCA §3108(b). In sum, the two provisions would not apply to exempt positions, and people in exempt positions, are not required to receive health and welfare benefits under 5 GCA §5802.

Whether the provisions will apply to non-exempt employees will depend if the majority of those non-exempt employees are providing services under a service contract. The Guam statute should be applied in a manner similar to the federal McNamara-O’Hara Service Contract Act. Under 29 CFR §4.113(a)(2), the Federal regulation makes it clear that the Federal counterpart to Guam’s statute does not apply to persons who are bona fide executive, administrative or professional personnel. 29 CFR §4.113(a)(2).
Furthermore, the Act does not apply to contracts performed essentially by bona fide executive, administrative, or professional employees, with the use of service employees being only a minor factor in the performance of the contract. Thus, if most of the work under the contract was performed mostly by executive, administrative or professional employees, and only a minor part of the contract consisted of work by service employees, the Federal act would not apply and the service employees would not be paid the minimum wage required under the McNamara-O’Hara Act. 29 CFR §4.113(a)(3). Therefore, under the Guam statute, if most of the service work is provided by exempt employees, the provisions of 5 GCA §§3107 and 3108 would not apply to the service contract, and those minimum wage provisions would not apply to the non-exempt employees.

Additionally, whether a position is exempt or non-exempt is determined under the rules outlined above. Simply because a position is characterized as exempt does not necessarily mean it is in fact exempt. However, if under the fact and circumstances test outlined above, the position is in fact exempt despite the person performing non-exempt functions on a limited basis, then the minimum wage provisions and the health and benefit provisions found in 5 GCA §§5801 and 5802 will not apply to those exempt positions.

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Cc: DOA Director